No. 91-881

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,

Petitioners,

—v.—

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 26, 1992

QUESTIONS PRESENTED

1. Whether, as the Fifth Circuit held, a former employee who retired with a lump-sum payment of all his or her pension benefits and who *is not* a "participant" with standing to sue under the Employee Retirement Income Security Act of 1974 ("ERISA") can establish standing by alleging an ERISA violation "but for which [he or she] would have standing"?

2. Whether, as the Fifth Circuit held, this Court's construction in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), of ERISA § 3(7)'s definition of "participant"—a defined term governing the entire subchapter (including ERISA § 510)—is not "applicable in all cases"?

3. Whether this Court's 1989 *Firestone* decision—which construed ERISA § 3(7)'s definition of "participant" and formulated the test for ERISA standing—was overruled or superseded *sub silentio* by the Court's 1990 decision in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990)—which dealt only with ERISA preemption and nowhere cited or discussed *Firestone*, ERISA § 3(7) or ERISA's definition of "participant"?

4. Whether a former employee who retired with a lump-sum payment of all his or her vested pension benefits—and who therefore has no claim to benefits—can satisfy ERISA's "participant" standing requirement by alleging that he or she did not retire voluntarily?

LIST OF PARTIES

Petitioners (defendants-appellees below):

Mobil Oil Corporation, a subsidiary of Mobil Corporation (a publicly held corporation). A list of Mobil Oil Corporation's non-wholly-owned subsidiaries, required by Sup. Ct. R. 29.1, is included in the appendix to this petition [46a].

Retirement Plan of Mobil Oil Corporation

Rex D. Adams (a Vice President of Mobil Corporation)

Respondents (plaintiffs-appellants below):

Gerald W. Christopher

Charles L. Prunty

Billy G. Turner

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No. 91-_____

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,

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GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation (the "Plan") and Rex Adams (collectively, "Mobil") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 950 F.2d 1209 (5th Cir. 1992) and is reprinted in the appendix at 1a-27a.

The orders of the United States District Court for the Eastern District of Texas (Schell, J.) have not been reported. They are reprinted in the appendix at 28a-31a.

JURISDICTION

The Fifth Circuit's judgment was entered on January 24, 1992. Petitioners and respondents all petitioned for panel rehearing, which was denied on February 24, 1992. [32a-35a.] This petition has been filed within 90 days of the denial of rehearing.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves §§ 3(7), 502 and 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(7), 1132 and 1140. These provisions are reprinted in the appendix at 36a-45a.

STATEMENT OF THE CASE

The issue in this case is whether three former Mobil employees—each of whom retired in 1984 and received a lump-sum payment of all his retirement benefits under Mobil's Retirement Plan—have standing to sue as "participants" under ERISA. ERISA § 3(7) defines a "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . ."

A. Factual Background

Mobil provides retirement benefits to its employees through a defined-benefit Retirement Plan, which promises retirees a pension based on their years of service and salary history with the company. The normal form of pension under the Plan has always been an annuity.

In 1977, Mobil amended the Plan to add a lump-sum option, which enabled certain retiring employees to receive the actuarial equivalent of their annuity in a single lump-sum payment, discounted to present value based on an assumed 5% interest rate. To be eligible to elect the lump-sum option, a retiring employee had to have either an accrued lump-sum pension benefit or a net worth (not counting the pension) of at least $250,000.

In February and June 1984, Mobil amended the Plan's lump-sum option by (a) increasing the lump-sum interest-rate assumption from 5% to 9.5% for years of service after the amendments became applicable, (b) increasing the lump-sum eligibility threshold from $250,000 to $450,000 (the projected equivalent in 1985 dollars of $250,000 in 1977 dollars), and (c) indexing the new eligibility threshold to the Consumer Price Index for future years.

These changes applied to all employees retiring on or after February 1, 1985. Mobil announced the amendments on July 2, 1984, creating a six-month notice or "window" period during which employees who already were eligible to retire with lump-sum pensions under the $250,000 threshold could either (a) retire under the "old" Plan by January 1, 1985 or (b) continue working as long as they wished under the "new" Plan.

Mobil requested a determination from the Internal Revenue Service (the "IRS") that the Plan, as amended,

continued to meet the Internal Revenue Code's criteria for favorable tax treatment, including the requirement that tax-qualified plans not "discriminate in favor of highly compensated employees," 26 U.S.C. § 401(a)(4). In late September 1984, the IRS agent reviewing Mobil's application expressed a concern that the amended Plan might result in benefits favoring highly compensated employees.

At the agent's suggestion, Mobil submitted an additional amendment that would allow Mobil, "in its sole discretion, [to] waive [the $450,000 eligibility test] in individual cases for valid cause shown, under the claim and appeal procedures of the Plan." The IRS issued a favorable determination letter on November 23, 1984, contingent on Mobil's adoption of the "waiver" provision.

Mobil announced the IRS approval to its employees on December 21, 1984. It did not disseminate the terms of the waiver provision until October 1985, after the window period had ended.

Respondents Gerald W. Christopher, Charles L. Prunty and Billy G. Turner ("plaintiffs") were among an alleged 1,100 Mobil employees who elected to retire during the window period and who now claim they would not otherwise have done so. Plaintiffs commenced this action on July 7, 1989, asserting that Mobil's conduct in amending the Plan and in allegedly withholding purportedly material information about the waiver provision and other matters had constructively "discharged" them in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621

et seq., and state law. They invoked jurisdiction under ADEA and 28 U.S.C. § 1332.[1]

The complaint also alleged that, if plaintiffs' state-law claims were preempted by ERISA, then Mobil's conduct violated ERISA. An exhibit to the complaint—a letter from plaintiffs' lawyer to Mobil—showed that plaintiffs alleged a violation of ERISA § 510.[2]

Plaintiffs sought the salary and employment benefits they allegedly would have received had they not retired as of January 1, 1985. Plaintiffs also requested reinstatement under ADEA. [5a.]

Mobil filed dispositive motions on plaintiffs' various claims. As to the ERISA claim, Mobil contended that plaintiffs lacked standing to sue as "participants" under ERISA § 502(a) and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989), because (a) they had retired with lump-sum payments of all their benefits

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1 Three other suits arising out of the 1984 Plan amendments are currently pending against Mobil: a companion case to this action in the Eastern District of Texas; a class action asserting ADEA and ERISA claims in the District of Colorado; and a putative class action asserting state-law claims in state court in Colorado.

A fourth action—the first case filed—resulted in an ADEA and ERISA judgment against Mobil. The Tenth Circuit reversed that judgment on all claims. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990).

2 ERISA § 510 provides that "[i]t shall be unlawful for any person to *discharge*, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this subchapter . . . ." 29 U.S.C. § 1140 (emphasis added).

under the Plan and (b) they did not have a reasonable expectation of returning to their jobs or of fulfilling future eligibility requirements for benefits.

B. Decisions Below

On June 22, 1990, the district court granted summary judgment for Mobil on the ADEA claims, holding them barred by statutes of limitations. [30a-31a.] The court also dismissed the state-law claims based on ERISA preemption and ruled that plaintiffs did not have standing to sue as "participants" under ERISA § 502(a). [28a-29a.]

The Fifth Circuit affirmed the ADEA limitations and ERISA preemption rulings but reversed and remanded the dismissal of plaintiffs' contingent ERISA claims. [1a-27a.] The court held that the district court's dismissal of the ERISA claims on the pleadings was "premature" [26a] because "whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, *but for* which he *would have* standing" [24a (emphasis added)].

The Fifth Circuit did not conclude that plaintiffs *are* in fact "participants" under ERISA. Instead, it noted that plaintiffs' allegations "do at least suggest an assertion that they were constructively discharged in violation of [ERISA] section 510 and that *but for* Mobil's nondisclosure they *would be* covered employees with standing to challenge the plan amendment." [26a (emphasis added).]

REASONS FOR GRANTING THE WRIT

In direct conflict with this Court's recent *Firestone* decision and ERISA's unambiguous language, the Fifth Circuit has adopted an ERISA standing analysis based on the same type of test this Court rejected in *Firestone*. The Fifth Circuit's approach could allow former employees who have received all their promised benefits and who *are not* "participants" (because they are not entitled to any additional benefits and do not have a reasonable expectation of returning to covered employment or of fulfilling eligibility requirements in the future) to sue former employers and benefit plans for damages by claiming that they *would have been* "participants" "but for" the defendants' alleged misconduct.

This judicial rewriting of the statutory language threatens to expand significantly the class of persons empowered to sue under ERISA. It also upsets the comprehensive and exclusive remedial scheme that Congress created, and it exposes employers and benefit plans to unpredictable—and potentially severe—liability that would undermine ERISA's purpose.

I.

The Fifth Circuit's "But-For" Standing Analysis Contravenes ERISA's Express Statutory Definition of "Participant" and Rejects this Court's Decision in *Firestone*.

A. ERISA's Definition and *Firestone* Limit the Scope of "Participant."

A person wishing to recover benefits or to enforce statutory rights under ERISA—including § 510—must sue under the statute's jurisdictional provision, ERISA § 502. ERISA § 510 itself states that "[t]he provisions

of [ERISA § 502] are applicable in the enforcement of this section."

Section 502(a) authorizes only plan "participants," "beneficiaries," "fiduciaries" and the Secretary of Labor to bring civil actions under ERISA. Plaintiffs here do not contend they have standing as anything other than "participants."

ERISA § 3(7) defines a "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . ." ERISA § 3(7).

A participant therefore must (*i*) be a present or former employee *and* (*ii*) be presently or potentially "eligible to receive a benefit" from an employee-benefit plan.

In *Firestone*, this Court construed both aspects of ERISA § 3(7)'s definition of "participant."

The Court held that "former employees" can sue as "participants" if they " 'have . . . a reasonable expectation of returning to covered employment' or . . . have 'a colorable claim' to vested benefits." 489 U.S. at 117 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986)).

The Court also ruled that, "[i]n order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." 489 U.S. at 117-18.

> "This view attributes conventional meanings to the statutory language since all employees in covered employment and former employees with a colorable

> claim to vested benefits 'may become eligible.' A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits, however, simply does not fit within the [phrase] 'may become eligible.' "

489 U.S. at 118 (quoting *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985)).[3]

Based on this construction of ERISA § 3(7), *Firestone* reversed the court of appeals' interpretation of "participant" as " ' "*someone who claims to be* a participant or beneficiary" ' "—because this reading "strays far from the statutory language." 489 U.S. at 117 (emphasis in original).

> To say that a "participant" is any person who claims to be one begs the question of who *is* a "participant" and renders the definition set forth in § 1002(7) superfluous.

Id. (emphasis added).

B. The Plaintiffs Are Not "Participants."

The three plaintiffs here are not ERISA "participants" because they do not meet either prong of *Firestone*'s construction of that defined term.

The Fifth Circuit acknowledged that plaintiffs are not presently eligible for benefits and do not have " 'a col-

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3 Although *Firestone* involved a claim under ERISA § 502(c), rather than § 502(a), "participant" is a defined term governing the entire subchapter. *See* ERISA § 3(7). This Court's holding also relied on the "natural reading" and " 'conventional meaning[ ]' " of § 3(7)'s language, 489 U.S. at 116-17, and the Court considered the appropriateness of different possible constructions of "participant" in light of the term's use in § 502(a), *see id.*

orable claim' to vested benefits," *Firestone*, 489 U.S. at 117, because they "received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement" [21a].

Plaintiffs also cannot satisfy the alternative requirement, because they do not have " 'a reasonable expectation of returning to covered employment,' " *Firestone*, 489 U.S. at 117.

First, at no time before filing their complaint did plaintiffs ever ask Mobil to rehire them. A lawsuit by someone who retired years earlier and who later seeks *judicial* reinstatement is not a request to be rehired. *See Winchester v. Pension Committee of Michael Reese Health Plan, Inc.*, 942 F.2d 1190, 1193 (7th Cir. 1991) (plaintiff asserting ERISA claim may not "harbor a 'reasonable expectation of returning to covered employment' " based on discrimination suit requesting reinstatement); *see also Firestone*, 489 U.S. at 119 (Scalia, J., concurring) (the phrase "may become eligible" in ERISA's definition of "participant" "has nothing to do with the probabilities of winning a suit"); *Gardner v. Container Corp. of Am.*, No. 88 C 1824, 1990 U.S. Dist. Lexis 15467 (N.D. Ill. Nov. 15, 1990) (relying on Justice Scalia's *Firestone* concurrence).

Second, even if plaintiffs' prayer for judicial reinstatement could by itself create " 'a reasonable expectation of returning to covered employment,' " *Firestone*, 489 U.S. at 117, plaintiffs still would not be persons who "may become eligible to receive a benefit" from Mobil's Plan, as ERISA § 3(7) requires:

- They do not have "a colorable claim that [they] will prevail in a suit for benefits," *Firestone*, 489 U.S. at 117—because they received all their

benefits in a lump sum when they retired, as the Fifth Circuit recognized [21a]; and

- They do not have "a colorable claim that . . . eligibility requirements will be fulfilled in the future," *Firestone*, 489 U.S. at 117-18—because they had *already* fulfilled those requirements by the time they retired and received their fully vested pensions.

In another case arising out of the same Plan amendments at issue here, the Tenth Circuit ruled that a former employee who—like plaintiffs here—received a lump-sum payment of all his pension benefits and never asked Mobil to rehire him was not a "participant" entitled to sue under ERISA. *Mitchell v. Mobil Oil Corp.*, 896 F.2d at 473-74.[4]

A Department of Labor regulation likewise provides that "[a]n individual is not a participant covered under an employee pension plan . . . if . . . [t]he individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the

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4 *Accord Winchester v. Pension Committee of Michael Reese Health Plan, Inc.*, 942 F.2d at 1192-93; *Teagardener v. Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 952-53 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 678 (1991); *Clark v. Superior Ct. for Dist. of Columbia*, 905 F.2d 389, 389 (D.C. Cir. 1990); *Kuntz v. Reese*, 785 F.2d at 1411-12; *Rhee v. Witco Corp.*, 762 F. Supp. 211, 213-14 (N.D. Ill. 1991); *Dick v. Haas-Wilkerson, Wohlberg*, No. 88-2017-0, 1990 U.S. Dist. Lexis 3416 (D. Kan. March 22, 1990); *Buchanan v. J.R. Foster Elec. Co.*, No. 89 C 4711, 1989 U.S. Dist. Lexis 15189 (N.D. Ill. Dec. 20, 1989); *McFarland v. Yegen*, 12 Employee Benefits Cas. (BNA) 1067, 1071-72 (D.N.J. Oct. 6, 1989); *Vilas v. Lyons*, 702 F. Supp. 555, 562 (D. Md. 1988); *Gilquist v. Becklin*, 675 F. Supp. 1168, 1170-71 (D. Minn. 1987), *aff'd mem.*, 871 F.2d 1093 (8th Cir. 1988).

plan." 29 C.F.R. § 2510.3-3(d)(2)(ii)(B). This construction of ERISA is entitled to special deference because the Department of Labor is one of the agencies charged with enforcing that statute. *See Mead Corp. v. Tilley*, 490 U.S. 714, 722, 726 (1989).

C. The Fifth Circuit Has Impermissibly Expanded *Firestone*'s Construction of "Participant."

In allowing plaintiffs to try to establish ERISA standing, the Fifth Circuit did not hold that plaintiffs *are* or might be "participants" under *Firestone*'s construction of ERISA § 3(7).

First, the court recognized—as did the Tenth Circuit in *Mitchell*—that plaintiffs did not have "a colorable claim for vested benefits" [21a]; *accord Mitchell*, 896 F.2d at 474.

Second, the Fifth Circuit did not conclude that plaintiffs had "a reasonable expectation of returning to covered employment" [21a, 22a-23a]. The court noted that plaintiffs had requested judicial reinstatement on their ADEA claim,[5] but it also observed that,

> [i]t would be unusual if [plaintiffs'] ability to assert a claim at all turned on whether or not [their] requested relief included reinstatement; it would seem more logical to say that but for the employer's

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5 To the extent the Fifth Circuit gave any weight to the complaint's request for judicial reinstatement, one court has already disagreed with that approach. *Shawley v. Bethlehem Steel Corp.*, 784 F. Supp. 1200, 1205-06 (W.D. Pa. 1992) (criticizing *Christopher* and holding that *Winchester v. Pension Committee of Michael Reese Health Plan*, 942 F.2d at 1193, "reflects the better reasoning" that a claim for judicial reinstatement cannot create standing; "the Fifth Circuit used the 'standing is based on a claim of standing' approach specifically rejected by the Supreme Court in *Firestone*").

> conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits . . . . [22a-23a (emphasis in original).]

The court therefore did not determine that plaintiffs came within *Firestone*'s definition of "participant." Instead, it held that (*i*) *Firestone*'s construction of that defined term is not "applicable in all cases" [22a], and (*ii*) plaintiffs could establish standing by claiming that they "*would have [had]* standing" or "*would be* covered employees with standing" "but for" their former employer's alleged ERISA violation [24a, 26a (emphasis added)]—even if they *are not* currently "participants."

This "but-for" standing analysis, like the one this Court rejected in *Firestone*, "strays far from the statutory language" and "begs the question of who *is* a 'participant,' " *Firestone*, 489 U.S. at 117 (emphasis added).

A person either *is* or *is not* a "participant." A person cannot become a "participant" merely by *claiming* that he or she is or *would have been* one. *Firestone*, 489 U.S. at 117.

As the Fourth Circuit has stated in rejecting this "but for" approach to ERISA standing, "[t]he effect of reading in a 'but for' test is to impose participant status on every single employee who *but for* some future contingency may become eligible. Neither caselaw nor other provision of ERISA supports such a reading of 'participant.' " *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *see also Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 655-56 (9th Cir. 1983) (nonparticipant

cannot become a "participant" by alleging he would have been one but for defendant's misrepresentation).[6]

The Fifth Circuit's decision not only disregards *Firestone*'s construction of "participant"; it also conflicts with the Tenth Circuit's *Mitchell* decision, the Department of Labor's regulation defining "participant," the Fourth and Ninth Circuits' opinions in *Stanton* and *Freeman*, and the Seventh Circuit's *Winchester* decision (to the extent the Fifth Circuit actually relied on plaintiffs' prayer for judicial reinstatement).

D. *Ingersoll-Rand* Did Not Alter *Firestone* or ERISA's Definition of "Participant."

The Fifth Circuit's conclusion that *Firestone*'s 1989 construction of ERISA § 3(7) was not "applicable in all cases" was based in large part on this Court's 1990 decision in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990). [22a-23a.]

The Court of Appeals' reliance on *Ingersoll-Rand* was misplaced.

First, *Ingersoll-Rand* had nothing to do with ERISA standing. It did not cite or discuss *Firestone* or ERISA § 3(7)'s definition of "participant." It dealt only with ERISA's preemption of state-law claims—and it pointed out that preemption does not depend on the existence of an ERISA cause of action. 111 S. Ct. at 486.

Second, *Ingersoll-Rand* held that "Congress intended § 502(a) to be the *exclusive* remedy for rights guaranteed under ERISA, *including those provided by § 510*," 111

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6 The Fifth Circuit relied on the Third Circuit's "but for" test of standing in *Saporito v. Combustion Eng'g Inc.*, 843 F.2d 666, 671 (3d Cir. 1988). [25a n.5.] This Court vacated and remanded *Saporito* in light of *Firestone*. 489 U.S. 1049 (1989).

S. Ct. at 485 (emphasis added). And § 510 itself states that "[t]he provisions of section [502] of this title shall be applicable in the enforcement of this section." Contrary to the Fifth Circuit's analysis [22a-25a], there is no justification for crafting a special construction of "participant" for § 510 cases. *Cf. Ingersoll-Rand*, 111 S. Ct. at 485 (" ' "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." ' ") (citations omitted).

Third, *Ingersoll-Rand* is consistent with *Firestone*. *If* the Fifth Circuit is correct that this Court considered ERISA standing and implicitly held in *Ingersoll-Rand* that the plaintiff (McClendon) would have been able to sue as an ERISA "participant" [22a], McClendon would fit within *Firestone*'s construction of that term.

McClendon claimed he had been fired to prevent his pension from vesting. By alleging that (a) he was fired in violation of ERISA § 510 and (b) his benefits otherwise would have vested, he could establish " 'a colorable claim' to vested benefits," *Firestone*, 489 U.S. at 117. He also could fit within the second prong of *Firestone*'s definition because he had "a colorable claim" that "eligibility requirements" for the vesting of his pension would "be fulfilled in the future" if he returned to covered employment, *Firestone*, 489 U.S. at 117-18.[7]

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7 *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 921-22 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991), on which the Fifth Circuit also relied [24a-25a], is similarly consistent with *Firestone*—and inapplicable here. The *Berger* plaintiffs all were denied "70/80" retirement benefits, 911 F.2d at 915; they therefore could allege a colorable claim to withheld benefits.

(footnote continued)

The Fifth Circuit therefore had no reason to believe that *Ingersoll-Rand* tacitly overruled or modified *Firestone* or redefined ERISA's definition of "participant"—even in ERISA § 510 cases.

II.

The Fifth Circuit's Standing Analysis Undermines ERISA's Purpose of Protecting Employees' Pension Rights, Upsets ERISA's Careful Balance Between Benefit Rights and Plan Costs, and Imposes Unpredictable and Potentially Serious Costs on Employers and Employee-Benefit Plans.

A. ERISA Was Designed to Protect Employees' *Benefits*.

The Court has held that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' . . . and 'to protect contractually defined *benefits* . . . .' " *Firestone*, 489 U.S. at 113 (citations omitted) (emphasis added); *cf. Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144, 148 (1985) (no extracontractual damages available under ERISA §§ 409 and 502(a)(2)).

The benefits that ERISA protects are those an employee or former employee has accrued through his or her employment. Once an employee has retired and has been paid all those benefits, ERISA does not give him or her a right to sue for *damages* based on years he or she never actually worked.

They also could allege they might have been able to fulfill eligibility requirements for those benefits in the future by returning to covered employment.

> Rather than enabling employees to get 'something for nothing'—i.e. to receive present benefits for anticipated future years of employment which have not actually been and may never be worked— . . . the essential purpose of ERISA is to prevent employees from getting 'nothing for something'—to prevent them from receiving fewer benefits than those they accrue through years of service.

Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164, 1176 (11th Cir. 1988) (en banc); *accord West v. Greyhound Corp.*, 813 F.2d 951, 955 (9th Cir. 1987) ("an employee has no ERISA right to future, unaccrued benefits").

It is because of ERISA's focus on *benefits* that ERISA §§ 3(7) and 502(a) restrict "participant" standing to present and former employees who "may become eligible to receive a *benefit*," 29 U.S.C. § 1002(7) (emphasis added).[8]

Section 510 is consistent with this limited definition of "participant." "Congress viewed [§ 510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised *benefits*." *Ingersoll-Rand*, 111 S. Ct. at 485 (emphasis added). Congress did not intend to grant a § 510 cause of action to persons whose interests are not protected by ERISA and who therefore do not have statutory standing.

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8 In contrast to participants, the Secretary of Labor does not sue to recover benefits or to enforce the terms of a benefit plan. *Compare* ERISA § 502(a)(1)(B) *and* § 502(a)(3)(A) *with* ERISA § 502(a)(5). Instead, the Secretary has broad authority to enforce the terms of the statute itself—including § 510. *See* ERISA § 502(a)(5). ERISA § 502(h) therefore requires any participant, beneficiary or fiduciary bringing an action other than one "which is solely for the purpose of recovering benefits due such participant[ ] under the terms of the plan" to serve a copy of his or her complaint on the Secretary of Labor and the Secretary of the Treasury.

B. The Fifth Circuit's Decision Upsets the Balance Congress Struck Between Benefits Protection and the Costs of Plan Creation and Maintenance.

In enacting ERISA, Congress realized that the potential costs of operating benefit plans under a voluntary system would be an important factor in employers' decisions about whether to adopt or maintain such plans and about what level of benefits (if any) to provide. *See, e.g.*, H.R. Rep. No. 90-807, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682; *see also Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988) ("The pension scheme as originally conceived by Congress and enforced by ERISA is essentially voluntary. ERISA nowhere mandates the institution of a pension program or the right to a pension.").

Because of Congress' desire to encourage the formation and maintenance of these voluntary plans, "all of the provisions of the Act [were] analyzed on the basis of their projected costs [to the employer and the plan] in relation to the anticipated benefit to the employee participant." H.R. Rep. No. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-40; *cf. Holliday v. Xerox Corp.*, 732 F.2d 548, 550 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984) ("recognizing that pension plans are voluntarily created by employers, Congress intended to 'avoid making these standards so tough that they will actually discourage the creation of new pension plans' ") (quoting 119 Cong. Rec. 30,041 (1973) (remarks of Senator Bentsen)).

Section 502(a)'s "comprehensive" and "exclusive" remedial scheme—which allows only participants, beneficiaries, fiduciaries and the Secretary of Labor to bring civil actions—is an essential part of this cost-benefit equation and "represents a careful balancing of the need for prompt and fair claims settlement procedures against

the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

The Fifth Circuit's expansion of ERISA § 502(a) remedies beyond those prescribed in the statute upsets the balance Congress struck between the costs and benefits of pension plans. Destruction of this balance threatens to increase benefit plans' and employers' financial liability—and therefore to reduce the pension rights available to current and future participants and beneficiaries.

First, the Fifth Circuit's "but for" test—which could grant § 502(a) standing to plaintiffs who *are* not "participants"—exposes plans and employers to unpredictable and potentially substantial damages claims by persons without even a colorable claim to benefits.

Second, the open-ended exception to the "participant" requirement creates costly uncertainties about the scope of a plan's (or an employer's) obligations to former employees.

"The term participant is of considerable importance within ERISA's statutory scheme because numerous rights under that scheme are limited to those who are included within that term." *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d at 476.

For example, "participants" are entitled to receive and request various plan documents, *see* ERISA § 104, 29 U.S.C. § 1024, and to obtain penalties if requested documents are not provided, *see* ERISA § 502(c). Participants are also owed certain fiduciary duties. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

One congressional goal in ERISA was to "help administrators, fiduciaries and participants to predict

the legality of proposed actions." H.R. Rep. No. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650; S. Rep. No. 93-127, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865.

Under the Fifth Circuit's "but-for" standing doctrine, however, a plan would no longer be able to predict its legal obligations to former employees, because those obligations might turn on unforeseeable allegations as to the "voluntariness" of former employees' retirements and other hypothetical "but for" theories—which would have to be taken as true for purposes of a motion to dismiss for lack of standing, *see Warth v. Seldin*, 422 U.S. 490, 501 (1975).

To avoid potentially costly litigation by persons who claim—counterfactually—that they *would have been* "participants," plans would be forced to bear the costs of treating former employees as full-fledged participants even where those persons have no colorable claim to benefits and no reasonable expectation of returning to covered employment to fulfill future eligibility requirements for benefits. *Cf. Firestone*, 489 U.S. at 118 (where there is any doubt as to whether claimant is a participant, plan administrators and fiduciaries will provide plan documents to avoid ERISA penalties).[9]

These added costs would "reduce the amounts available to actual beneficiaries of plans for no statutory purpose," *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*,

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9 ERISA cases constitute a substantial—and increasing—portion of the federal courts' dockets. In the 12-month periods ending June 30, 1990 and 1991, the number of new ERISA actions rose 13.7%: from 8,441 to 9,595. Virtually all of those cases were private civil actions. ERISA cases accounted for 3.9% and 4.6% of all civil actions commenced during those two periods. 1991 Admin. Office of U.S. Courts Annual Report at 191.

754 F.2d at 476—and, especially in the case of defined-benefit plans (such as Mobil's), would also impose additional costs on employers and plan settlors, thus discouraging plan formation or maintenance.

Unless this Court grants review, the uncertainties created by the Fifth Circuit's ruling could affect plans throughout the country. Under ERISA's broad venue provision, § 502(e)(2), 29 U.S.C. § 1132(e)(2), any plan or employer over which a court in the Fifth Circuit could exercise personal jurisdiction might become liable to former employees under Fifth Circuit law, regardless of where the plan is administered or whether it covers persons or facilities within the Fifth Circuit, and regardless of where the employer is located. *See, e.g., Varsic v. United States Dist. Ct. for Central Dist. of Cal.*, 607 F.2d 245, 247-50 (9th Cir. 1979); *Nieves v. Houston Indus., Inc.*, 771 F. Supp. 159, 161 (M.D. La. 1991).

ERISA's goal was to provide a *uniform* body of federal law governing benefit plans to avoid the inefficiencies—and consequent reduction in plan benefits—that would result from conflicting and inconsistent regulatory schemes. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 8-11 (1986); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 & n.25 (1983).

By exposing plans and employers to unpredictable and potentially substantial liabilities to former employees to whom they owe no statutory duty under ERISA, the Fifth Circuit's ruling creates an uncertain and inconsistent legal environment for plans and employers—particularly in light of the Fourth, Seventh, Ninth and Tenth Circuits' contrary decisions, *see* section I.C., *supra*. It is therefore imperative that this Court address the scope of former employees' standing and the exception that the Fifth Circuit has created to ERISA's statutory standing requirements.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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May 26, 1992

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit, January 24, 1992

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4562

Jan. 24, 1992

GERALD W. CHRISTOPHER, Charles L. Prunty, and Billy G. Turner,

Plaintiffs-Appellants,

—v.—

MOBIL OIL CORPORATION, Retirement Plan of Mobil Oil Corporation and Rex Adams,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

B e f o r e :

HENLEY,* KING, and GARWOOD,
Circuit Judges.

GARWOOD, *Circuit Judge*:

Appellants brought claims under the Age Discrimination in Employment Act (ADEA) and the Employee Retirement Income Security Act (ERISA), as well as

* Circuit Judge of the Eighth Circuit, sitting by designation.

various common-law claims including fraud, civil conspiracy, and breach of the employment contract, against their former employer Mobil Oil Corporation, based on Mobil's 1984 amendment of its employee benefit plan and alleged failure to disclose to appellants all of the options available under the amended plan. The district court granted Mobil's motion for summary judgment on the ADEA claims on the grounds that the claims were time-barred and that as a matter of law appellants were not constructively discharged in violation of ADEA. The district court also granted Mobil's request for judgment on the pleadings on appellants' state law claims on the ground that they were preempted by ERISA, and dismissed the ERISA claims on the ground that because appellants were not participants seeking to recover benefits from a retirement plan, the court lacked jurisdiction over their ERISA claims. We affirm in part and reverse and remand in part.

Facts and Proceedings Below

The following facts are drawn from the parties' submissions of undisputed facts in connection with Mobil's motions for summary judgment, judgment on the pleadings, and dismissal.

Mobil provides retirement benefits for its employees through a defined benefit plan, under which employees receive a pension based on years of service, salary history, and life expectancy. Until 1977, the standard method of receiving these pensions was in the form of an annuity. In that year, however, Mobile [sic] added a lump sum option, enabling certain employees to receive the actuarial equivalent of their annuity, discounted at five percent, in one payment following retirement. To be eligible for the lump sum option, an employee had to have either an accrued lump sum pension benefit, or a

net worth independent of the pension, equal to at least $250,000. Also, the employee was required to be at least fifty-five years old.

On July 2, 1984, Mobil announced changes to the lump sum option of the retirement plan, including (1) an increase in the discount rate from 5% to 9.5%, to operate prospectively, *i.e.*, to be applied to all earnings after January 31, 1985; (2) an increase in the eligibility threshold from $250,000 to $450,000; and (3) a linking of the new threshold to the Consumer Price Index. These changes, which were announced as subject to Internal Revenue Service (IRS) approval, would apply to all employees retiring after January 31, 1985; thus, employees otherwise eligible to retire had a six-month window in which they could retire subject to the lower threshold and lower discount rate. The choice was a significant one for employees who met the $250,000 threshold but who were uncertain ever to meet the indexed $450,000 threshold because, with market interest rates well above 5%, the lump sum pensions were worth 40% more than the annuities. Appellants, Gerald Christopher, Charles Prunty, and Billy Turner, were among the approximately 1,100 Mobil employees who elected to take early retirement during the 6-month window. All three submitted their retirement notices between August and October 1984, and retired as of January 1, 1985.

On July 16, 1984, Mobil sought a determination from the IRS that the plan as amended continued to meet the Internal Revenue Code's requirements for favorable tax treatment, including the requirement that pension plans not "discriminate in favor of highly compensated employees." 26 U.S.C. § 401(a)(4). In meetings in late September 1984, the IRS reviewing agent expressed concern that the amended plan could result in benefits favoring highly compensated employees, and indicated that he might need to seek technical advice from Wash-

ington. In response, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility threshold in individual cases for valid cause shown. After insertion of this provision, the IRS issued to Mobil a favorable determination letter on November 23, 1984, noting that continued qualification of the plan would depend upon its effect in operation.

Mobil announced the IRS approval to its employees on December 21, 1984, but did not notify its employees of the waiver provision until well after expiration of the six-month window—October 1985. Because of a 1985 IRS revenue ruling and subsequent pronouncements, Mobil eventually entirely deleted the lump sum eligibility threshold in 1986.

Appellants filed age discrimination charges against Mobil with the Equal Employment Opportunity Commission (EEOC) on March 1, 1989. They alleged that Mobil's conduct in amending the plan and concealing the waiver provision was a concerted scheme to reduce its work force. By purporting to increase the lump sum threshold and concealing its awareness that applicable tax law precluded that action, appellants charged, Mobil induced hundreds of older employees into retirement without the need to pay them an early retirement bonus. The EEOC dismissed the charges as untimely filed. Appellants then commenced this suit on July 7, 1989. They alleged that Mobil's conduct constituted age discrimination in violation of ADEA, 29 U.S.C. §§ 621 *et seq.*, as well as common-law fraud, civil conspiracy, unlawful interference with contract rights, breach of the employment contract, negligence, and gross negligence. In the event that appellants' state law claims were held to be preempted by ERISA, the complaint alleged in brief and conclusory fashion that Mobil's conduct violated ERISA, apparently ERISA § 510, 29 U.S.C. § 1140, prohibiting interference with an employee's

attainment of a right under ERISA. For all claims, appellants sought the wages and employment benefits they would have received had they continued working until normal retirement age. On the ADEA claims, appellants also requested reinstatement.

Mobil moved for summary judgment on the ADEA and state law claims. The district court granted the motion, finding that the ADEA and state law claims were time-barred, that appellants had not been constructively discharged in violation of the ADEA, and that appellants' claims of discrimination arose from changes in fringe benefits available under a bona fide retirement plan, not from discrimination in nonfringe aspects of employment, and thus were not within the purview of the ADEA according to ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2). Simultaneously, Mobil moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on the state law claims on the ground that they were preempted by ERISA, and dismissal under Federal Rules of Civil Procedure 12(b)(1) & (6) of the contingent ERISA claim on the ground that appellants were not "participants" seeking to recover benefits under ERISA § 502, 29 U.S.C. § 1132, depriving the court of jurisdiction. The district court granted this motion as well.

Discussion

I. ADEA Claims

We first examine the district court's grant of summary judgment on the ADEA claims on the ground that they were time-barred. In reviewing a grant of summary judgment, all legitimate factual inferences presented by the record are drawn in favor of the party opposing the motion. *Bozé v. Branstetter*, 912 F.2d 801, 804 (5th Cir.1990) (per curiam). We can uphold the summary

judgment only if our review demonstrates that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

It is not disputed that the applicable statutes of limitations require an employee to file an age discrimination charge with the EEOC within 300 days after the alleged unlawful practice occurred, 29 U.S.C. § 626(d)(2), and to file a lawsuit within 3 years after the alleged unlawful practice occurred, 29 U.S.C. §§ 255(a), 626(e). Appellants argue, however, that a genuine issue of material fact exists as to when their awareness of the facts constituting the alleged age discrimination was sufficient to commence the running of the limitations period. *See Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir.1986) ("[T]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with reasonably prudent regard for his rights." (quoting *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir.1975))). Specifically, they argue that Mobil's negotiation of a revised plan in October 1984 only came to light in 1988 when counsel for another former employee, Porter Mitchell (Mitchell), suing Mobil in federal district court in Colorado, discovered the correspondence between Mobil and the IRS. It was only when this fact became publicly known at the trial of *Mitchell v. Mobil Oil Corp.* in December 1988,[1] appellants argue,

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1 The alleged fraud was not part of Mitchell's claims against Mobil. He argued, rather, that the plan amendment itself constituted a constructive discharge and was a willful violation of the ADEA. He also argued that Mobil had breached its fiduciary duties under ERISA § 404, 29 U.S.C. § 1104, and had violated ERISA's anti-cutback provision, ERISA § 204(g), 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump sum option, an accrued benefit. The jury found in favor of Mitchell on his ADEA claim and awarded

that they had any reason to know of Mobil's concealment of the waiver option. Appellants' EEOC filing in March 1989 and their commencement of this suit in July 1989 would both have been timely if the statute of limitations had commenced running in December 1988.

Evaluating the appellants' claim that the statute of limitations did not commence until December 1988 requires an analysis of the nature of their ADEA claim. The ADEA forbids an employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A "discharge" within the meaning of this section may be constructive if a reasonable person in the employee's position would have felt compelled to resign under the circumstances. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir.), *cert. denied*, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988). An attractive early retirement offer, however, is not a constructive discharge merely because it creates a strong incentive to retire; an early retirement option can constitute a constructive discharge only if the employee shows that it sufficiently alters the status quo that each choice facing the employee makes him worse off. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 467 (10th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990); *Bodnar*, 843 F.2d at 193.

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him damages for back pay, front pay, and lost benefits. The district court held in favor of Mitchell on the ERISA claims as well, awarding him compensatory and liquidated damages. On appeal, the Tenth Circuit reversed, holding that Mitchell had failed to prove that Mobil's proffered justification for the plan amendment was a mere pretext for discrimination, and that Mitchell was not a participant with standing to assert ERISA claims. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 471-74 (10th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

The gist of appellants' *prima facie* ADEA claim is as follows. The adoption of the 1984 plan amendment presented appellants with a choice between unfavorable options; they faced the choice of retiring within the six-month window or staying on at Mobil but possibly forgoing eligibility for the lump sum payout. Either could be regarded as less favorable than staying on at Mobil until normal retirement age with the assurance of eligibility for the lump sum payout, which was the "status quo" when the amendment was adopted. The asserted discriminatory character of the amendment to the plan arises from the fact that only employees over the age of fifty-five were put to that choice. Employees under fifty-five did not presently qualify for retirement, so although the plan amendment may have defeated an expectation for them, they were not confronted with the possibility of losing a benefit for which they were then qualified. *See Mitchell*, 896 F.2d at 496.

This much of the ADEA theory was evident in July 1984 upon the initial announcement of the plan. The unfavorable choice to which it put "window" employees and its particular impact on employees over fifty-five were both apparent on the face of the plan amendment. Indeed, the theory outlined above was precisely Mitchell's claim against Mobil, accepted by the Tenth Circuit. Mitchell filed a complaint with the EEOC on April 25, 1985, with no knowledge of Mobil's alleged concealment of the waiver provision. Moreover, another employee, Frederic J. Raymond (Raymond), filed a similar charge with the Ohio Civil Rights Commission and the EEOC on May 10, 1985. Therefore, unless appellants can show that Mobil's alleged concealment adds a material element to their ADEA claim, the statute of limitations should have commenced running in July 1984.

Appellants have offered no theory under which the alleged nondisclosure is a necessary element. They refer

us to the Fourth Circuit case of *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988), for their argument that "where, as here, the employee surrenders his job as a proximate result of fraud and deceit by the employer, the voluntariness of the retirement or resignation is fundamentally vitiated." *Stone* is one of a series of cases where resignations have been held to be involuntary based on an employer's misrepresentations about or nondisclosure of an employee's rights. Others include *Covington v. Department of Health and Human Services*, 750 F.2d 937 (Fed.Cir. 1984), and *Scharf v. Department of the Air Force*, 710 F.2d 1572 (Fed.Cir.1983).

We do not believe that these cases avail appellants, however. As appellants' phrasing of their argument reflects, the effect of a showing of fraud in these cases is to render an otherwise voluntary choice involuntary. *Stone* and related cases involve disputes in which public employees were entitled to certain procedural protections if they were to be terminated involuntarily; they were required to show that their retirement was involuntary to invoke the jurisdiction of the Merit Systems Protection Board or to establish a "deprivation" under the due process clause. Here, by contrast, appellants allege a constructive discharge arising from the choice to which they were put by the plan amendment. To further argue that the actual election made was involuntary because it was based on incomplete information would be superfluous; involuntariness is implicit in appellants' argument that they were coerced into early retirement by the threatened removal of the lump sum option. Assuming, *arguendo* only, that appellants' allegations of nondisclosure would serve to estop Mobil from raising in defense the claim that appellants' retirement was voluntary, nevertheless the asserted nondisclosure does not form a material part of appellants' constructive discharge the-

ory that would prevent the statute of limitations from commencing.

Appellants' arguments that this Court should apply equitable tolling or equitable estoppel fail for similar reasons. These doctrines provide for tolling of the statute of limitations when a plaintiff's unawareness of his ability to bring a claim—either unawareness of the facts necessary to support a discrimination charge or unawareness of his legal rights—is due to defendant's misconduct. *See Rhodes v. Guiberson Oil Tools Division*, 927 F.2d 876, 878-79 (5th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 198, 116 L.Ed.2d 158 (1991); *Kale v. Combined Insurance Co.*, 861 F.2d 746, 752 (1st Cir. 1988). Here, the knowledge allegedly concealed from the employees was that they had a third option—to continue their employment and apply for a waiver from the higher lump sum requirement. Therefore, the facts as known to the employees in 1984 actually gave them a *better* ADEA claim than they would have had with full knowledge. Whatever nondisclosures Mobil is guilty of would not have lulled appellants into postponing assertion of their rights; if anything, it would have made them *more* likely to assert that they were constructively discharged.

Finally, appellants argue that although they knew in 1984 of the plan amendment and retirement window, they were misled into believing that they had no cause of action by Mobil's plausible justifications for its amendment of the plan, *i.e.*, that the threshold was changed to adjust for intervening inflation and that the discount rate was raised to align Mobil's practice with that of its competitors and to more realistically reflect current interest rates. In other words, appellants contend that although the discriminatory *effect* of the amendment was apparent in 1984, it was only upon learning of the concealment of the waiver option that they had rea-

son to believe the plan amendment was actuated by age bias and that the alleged concerted scheme to reduce the work force began to take shape.

We find this argument unpersuasive as well. First, we fail to see how the deception alleged by appellants calls into question Mobil's proffered justifications for the plan amendment. The evidence does not create a genuine dispute as to the factual accuracy of Mobil's proffered justifications. Even if appellants' allegations are true respecting Mobil's having deceived its employees about the validity under applicable tax law of the plan amendment and about the waiver provision, there is no evidence showing that Mobil's announced reasons for the plan amendment were deceptive. This is an issue on which appellants would have had the burden at trial, and they were hence required to meet Mobil's summary judgment motion with summary judgment evidence that would sustain a jury finding in their favor on the issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 644 (5th Cir.1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989).

In any event, a showing of deception as to motive supports equitable estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose. Thus, where an employee was told that he was being discharged because industry economic downturn required reduction of the work force, and was told that he would be considered for re-hiring, we applied equitable estoppel to hold that limitations on his ADEA claim did not commence until he learned that he had been replaced by a younger employee. *Rhodes*, 927 F.2d at

880-82; *see also Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir.1981) (en banc) (employer's misrepresentation that employee would be reinstated induced foreseeable forbearance in filing ADEA claim); *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 (3d Cir.1983) (employer's explanation to employee that he was dismissed as part of a reorganization furnished grounds for equitable tolling in an ADEA suit until discharged employee learned that a younger replacement had been hired), *cert. dismissed*, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984). By contrast, where an employee knew that he was discharged and replaced by a younger employee, his allegation that the company concealed from him the true reason for his discharge and that it was not until subsequent hirings that the "pattern of age discrimination" became evidence was held insufficient to support equitable estoppel. *Pruet Production Co.*, 784 F.2d at 1279-80; *accord Chapman v. Homco, Inc.*, 886 F.2d 756, 758 (5th Cir.1989), *cert. denied*, 494 U.S. 1067, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *Blumberg*, 848 F.2d at 645.[2] The showing required for a *prima facie* employment discrimination claim is minimal, *see Pruet Production Co.*, 784 F.2d at 1279, and when "facts that would support a cause of action are or should be apparent," the statute commences even if the employee is not aware of *all* the evidence that he will ultimately rely upon at trial. *Blumberg*, 848 F.2d at 645 (emphasis added). The showing required at the stage of filing charges with the EEOC is even more lenient, because the purpose of the filing is

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2 This view is consistent with this Circuit's rule in Title VII cases that the limitations period starts running when the plaintiff knows of the discriminatory *act*, not when the plaintiff perceives a discriminatory motive behind the act. *See Merrill v. Southern Methodist University*, 806 F.2d 600, 605 (5th Cir.1986).

only to initiate an EEOC investigation. *Pruet Production Co.*, 784 F.2d at 1279.

Applying those principles here, we conclude that whatever concealment Mobil may have been guilty of did not deceive appellants as to the facts of the alleged discrimination. Rather, appellants were able to evaluate the propriety of their alleged constructive discharge for ADEA purposes immediately. Just as in individual discharge cases the *prima facie* showing is only that the employee has been discharged and replaced by a younger worker, leaving exploration of an employer's motives for the EEOC investigation or pretrial discovery, here the appellants' *prima facie* case for constructive discharge was that older employees alone were put to the unfavorable choice of early retirement or loss of the lump sum option. This fact, apparent in July 1984, was sufficient to put appellants on notice of possible age discrimination (as it did other Mobil employees) and to require them to assert their rights.

For these reasons, even accepting for purposes of our review of the summary judgment appellants' charges of nondisclosure, we do not believe that a genuine issue of material fact exists as to when the statute of limitations on the ADEA claims commenced. Concluding that the district court's grant of summary judgment is supported on that ground, we do not reach the district court's further holding that as a matter of law appellants were not constructively discharged in violation of the ADEA.

II. ERISA Preemption of State Law Claims

We next address the district court's grant of judgment on the pleadings on appellants' state law claims. Appellants charged that Mobil's actions in amending the plan and withholding information about the waiver provision fraudulently induced them to surrender their jobs, were taken pursuant to a plan to reduce Mobil's work force,

and breached the duty of good faith and fair dealing owed to appellants by Mobil under their employment contracts. This conduct, appellants alleged, gave rise to claims for fraud, civil conspiracy, breach of the employment contract, unlawful interference with contract rights, negligence, and gross negligence. The district court held these claims were preempted because they "relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA." We turn to the first ground relied upon by the district court, namely that appellants' claims "relate to" an ERISA-governed retirement plan.

ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). The Supreme Court has consistently emphasized the expansiveness of the "relate to" standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern. *See, e.g., Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990); *FMC Corp. v. Holliday*, ____ U.S. ____, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 1552-53, 95 L.Ed.2d 39 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 2899-2901, 77 L.Ed.2d 490 (1983). The words "relate to" are to be given their "broad common-sense meaning," *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985), and a state law will be pre-empted "if it has a connection with or reference to such a plan." *Shaw*, 103 S.Ct. at 2900. This Circuit has held that the fact that a claim sought damages measured by pension benefits sufficed as the requisite "connection" to an employee benefit plan for preemption purposes. *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290,

1294 (5th Cir.1989). *But see Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236, 247 (5th Cir.1990); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120-21 (4th Cir.1989).

The complaints here focus on Mobil's amendment of an ERISA-governed employee benefit plan and Mobil's disclosure to its employees of the terms of the plan. In addition to calculating their damages by computing lost benefits under the plan, a court adjudicating appellants' claims of a fraudulent scheme to reduce the work force would have to examine, at a minimum, the operation of the plan prior to the amendment, the language of the plan amendments, and Mobil's communication to its employees about the terms of the plan amendments. Given the breadth of the section 514(a) test, we find that these connections are adequate to warrant preemption.

This conclusion is buttressed by decisions of this and other courts addressing claims of fraudulently induced retirement and wrongful termination, which are the crux of appellants' state law claims here. In the closely analogous case of *Lee v. E.I. DuPont de Nemours and Co.*, 894 F.2d 755 (5th Cir.1990), the plaintiffs alleged that they had retired in reliance on their employer's representations that the company was not preparing to adopt an early retirement incentive plan, and they sued their former employer for fraud and negligent misrepresentation in that respect. We held that the claims were preempted under section 514(a). *Id.* at 758; *see also Cefalu*, 871 F.2d at 1295 (breach-of-contract claim for oral misrepresentation that retirement options offered equivalent benefits was preempted); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir.1989) (claim for breach of an oral agreement to pay early retirement benefits was preempted). In a case almost identical to the present one, the Third Circuit held that where employees alleged that an employer's notification of proposed plan amend-

ments misrepresented to them that they would lose a retirement benefit if they did not retire in a window period before the amendments became applicable, their claims were preempted. *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 923 (3d Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991).

In addition, the Supreme Court recently spoke decisively to the question whether a tort claim premised on wrongful discharge to prevent vesting of pension benefits could survive independently of ERISA. In *Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990), the Court found that the claim "related to" an ERISA-covered plan under section 514(a). Appellants here seek to distinguish their "wrongful discharge by fraud" claim from the tort claim at issue in *McClendon*. They argue that whereas the existence of a pension plan is a necessary *element* of the cause of action considered in *McClendon* (discharge to prevent vesting of pension benefits), here the pension plan was merely the *subject* of Mobil's fraud. The fraud claim itself, they argue, is conceptually identical to a fraud claim concerning any other subject matter, and ERISA cannot generally preempt state laws prohibiting employers from fraudulently inducing employees to give up their jobs. Appellants rely on *Mackey v. Lanier Collections Agency and Service*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), in which the Court noted that lawsuits based on "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are not preempted merely because the suits are brought against an ERISA plan. *Id.* 108 S.Ct. at 2187.

We do not find this argument persuasive. We have previously noted that preempted state law includes any state law cause of action as it relates to an employee benefit plan, even if it arises under a general law which

in and of itself has no connection to employee benefit plans. *Cefalu*, 871 F.2d at 1292 n. 5. Although there would undoubtedly be cases of fraudulently induced retirement that were not preempted, the specific conduct here, as in *Lee*, *Cefalu*, and *Degan*, relates directly to the operation of an ERISA plan. Superimposing state law fraud standards on the elaborate ERISA provisions governing the content and timing of notice of plan provisions and amendments, *see* ERISA §§ 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b), would undercut the goal of uniform national regulation in the manner that section 514(a) seeks to prevent. *See Memorial Hospital System*, 904 F.2d at 245 (observing that preemption is proper where the state law claims address areas of exclusive federal concern, and where they directly affect the relationship among the traditional ERISA entities). In our view, this makes the conduct at issue here a far cry from the "run-of-the-mill" claims alluded to in *Mackey*.[3]

For the same reason, appellants' reliance on *Hartle v. Packard Electric*, 877 F.2d 354 (5th Cir.1989) (per curiam) is misplaced. In *Hartle*, a discharged employee brought suit for wrongful termination and civil conspiracy to unlawfully terminate his employment. Because the general rule in Mississippi was employment at will, he argued that his participation in an employee benefit plan had removed his employment from employment-at-will status and had effectively given him a tenured posi-

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3 Appellants also cite *Greenblatt v. Budd Co.*, 666 F.Supp. 735 (E.D.Pa.1987), which does provide more direct support for their argument than the fact that the *subject* of the alleged fraud is pension benefits is incidental and does not warrant preemption. *See id.* at 742. However, we agree with the Seventh Circuit that *Greenblatt* is not consistent with our Circuit's holding in *Cefalu*. *See Lister v. Stark*, 890 F.2d 941, 945 n. 10 (7th Cir.1989), *cert. denied*, ____ U.S. ____, 111 S.Ct. 579, 112 L.Ed.2d 584 (1990). Therefore, we, like the Seventh Circuit, decline to follow *Greenblatt*. *See id.* at 945.

tion. However, because the employer's complained-of conduct did not pertain to the operation of an ERISA plan, we observed that Hartle's claim did "not in any manner implicate the federal regulation of employee benefit plans" and held that preemption was not proper. *Id.* at 356. Here, the employer's conduct *does* relate to the pension plan, and federal regulation of retirement plans is implicated to a much greater degree.

Finally, appellants argue that even if their state law claims are preempted to the extent that the damages sought are deemed to be "benefits," the preemption would not bar the claims in their entirety, and that the claims for lost wages, exemplary damages, and the like, would survive as state law claims. They rely on several cases finding partial preemption only. One is *Krause v. Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir.1990), in which a terminated employee filed claims under the ADEA and for breach of an implied contract for tenured job security. The district court entered summary judgment for the defendant on the breach-of-contract claim insofar as it sought lost pension, health insurance, or life insurance benefits, on the grounds of ERISA preemption. The Tenth Circuit upheld a verdict for the plaintiff on the claim for lost salary, however, stating, "We are at a loss to see how a breach of contract claim solely for lost salary is at all related to an employee benefit plan," and holding that there was no preemption of that claim. *Id.* at 680 (citing *Hartle*, *supra*). Likewise, in *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir.1987), the Ninth Circuit held that an employee's claim of breach of contract and wrongful discharge in part relied on theories independent of the benefit plan and thus was not entirely preempted. *Id.* at 800. Finally, appellants cite *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1245 (11th Cir.1989), for the proposition that the

same set of operative facts can give rise to both preempted and unpreempted causes of action.

We conclude that this type of partial preemption is inappropriate in the present case, however. Unlike *Krause*, this case is not one where the main nexus to an employee benefit plan is only the calculation of damages. Once stripped of its link to the pension plan provided by the measure of damages, the *Krause* plaintiff's claim survived as a suit for lost salary based upon breach of an implied contract of continued employment. Here, by contrast, the basis of the claims themselves is the operation of the pension plan; if appellants' claims were stripped of their link to the pension plans, they would cease to exist. The *Sorosky* and *Clark* courts employed a similar analysis which would support complete preemption in the present case. In *Sorosky*, the court held that Sorosky's claim that Burroughs agreed to provide him with monthly retirement benefits and then sought to prevent him from acquiring those benefits was preempted; it was only breach-of-contract or wrongful discharge theories "that have no relationship to the benefit plan" that survived as independent state law claims. *Sorosky*, 826 F.2d at 800. The *Clark* court confronted an employee's claim that his termination, in addition to being effected for the purpose of interfering with his attainment of pension benefits in violation of ERISA § 510, 29 U.S.C. § 1140, was carried out in a malicious manner that inflicted severe emotional distress upon him. The court held that the tort claim, though it "allude[d] to conduct which was proximate (or even concurrent) in *time* to the alleged ERISA violation," was "wholly remote in *content*"; the employee had "not alleged any conduct on the part of Coats & Clark which relates to the processing of any ERISA covered benefit or claim." *Clark*, 865 F.2d at 1243. However, *Clark* carefully distinguished the employee's claim there from

a claim that a refusal to pay pension benefits was itself so outrageous as to amount to intentional infliction of emotional distress, which the court had found to be preempted in *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir.1987).

Because the underlying conduct at issue here cannot be divorced from its connection to the employee benefit plan, we uphold the district court's judgment that the state law claims are preempted in their entirety.

III. ERISA Standing

ERISA grants standing to a "participant" to bring a civil action to enforce his rights under the terms of a plan or to enforce the provisions of ERISA. ERISA § 502, 29 U.S.C. § 1132. The district court granted Mobil's motion to dismiss appellants' ERISA claims on the ground that appellants were not "participants" within the meaning of that section and therefore were not empowered to sue. *See Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1286 & n. 3 (5th Cir.1980).

ERISA defines the term "participant" to include "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). The Supreme Court recently addressed the meaning of the "former employee" component of that definition. In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the Court observed that the definition referred to "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Id.* 109 S.Ct. at 958 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). The Court also construed the

"may become eligible" language of section 3(7) to mean that "a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*

Mobil argues that appellants do not have standing because they have neither a colorable claim for vested benefits nor a reasonable expectation of returning to covered employment. In Mitchell's suit against Mobil, the Tenth Circuit denied ERISA standing to the plaintiffs on the ground here urged by Mobil. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

The first part of this conclusion finds support in the decisions of this Circuit. We have held that where, as here, retired employees received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement, their claim is for damages, not vested benefits. *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-09 (5th Cir.1985) (per curiam); *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985); *accord Kuntz*, 785 F.2d at 1411. In *Yancy*, the employer announced its intention to modify the interest rate factor used to calculate lump sum retirement benefits, but gave employees approximately three months in which to retire under the older, more generous discount rate. We denied standing to an employee who took early retirement during the three months, received his lump sum payment, then sued alleging that the amendment of the plan violated fiduciary duties imposed by ERISA. We held that, lacking a claim for vested benefits, he could not be deemed a plan "participant." *Yancy*, 768 F.2d at 709.

For the second part of its conclusion—that the plaintiff lacked a reasonable expectation of returning to covered employment—the *Mitchell* court relied on the fact that the plaintiff had not sought reinstatement. *Mitchell*, 896 F.2d at 474; *see also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991); *Kuntz*, 785 F.2d at 1411. In the present case, the only request for reinstatement in appellants' original complaint is in the ADEA claim, which we have held to be barred by the statute of limitations. *See* section I, *supra*. However, this request does indicate that appellants do desire court-ordered reinstatement.

We are not convinced that *Firestone* can be read to reduce the standing question to a straightforward formula applicable in all cases. This seems particularly so in cases involving allegations of discharge. ERISA § 510, 29 U.S.C. § 1140, makes it unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant" for exercising a right provided by ERISA or "for the purpose of interfering with the attainment" of a right provided by ERISA. The Supreme Court's recent *McClendon* decision held that this provision would foreclose the development of any state law cause of action for wrongful termination to prevent vesting of pension benefits. *Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S.Ct. 478, 485, 112 L.Ed.2d 474 (1990). The implication of the Court's holding that the discharged employee must look solely to ERISA for his remedy is that he would have standing to do so. Nevertheless, it is not readily apparent that he would have standing under the construction of *Firestone* urged by Mobil; he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment. It

would be unusual if in that situation his ability to assert a claim at all turned on whether or not his requested relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing. *Cf. Amalgamated Clothing and Textile Workers v. Murdock*, 861 F.2d 1406, 1418 (9th Cir.1988) ("It would be ironic if the very acts of benefit payment and plan termination that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing . . . to redress the fiduciaries' alleged breach of the duty of loyalty.").[4]

Therefore, recognizing that we are anchored at one end by *Yancy*, we also believe that *Yancy* does not extend so far as to encompass situations such as the one at issue in *McClendon*. The question then becomes where on that axis the present case falls. A few pertinent distinctions between the two cases bear emphasis. Yancy's position as a retired employee who had received lump sum benefits was largely of his own making. He was informed of the plan amendment and of the effects of each option open to him. Our holding in the case amounts to a decision that he could not both accept the offered inducement for early retirement and then later

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4 We do not mean to imply that an employee's entitlement to certain *remedies* might not turn on whether or not he was willing to return to work. If, for example, he claimed entitlement to the fully vested pension as damages, it might be perfectly reasonable to require that he return to work at least for the additional length of time required for the pension to vest. However, a wrongful discharge might give rise to other damages as well, for which reinstatement would not seem to be a logical prerequisite.

complain of the choice to which he had been put; if he felt that he was entitled to continue to work and then retire at the time of his choice with a lump sum calculated at the old rate, he was obligated to act consistently with his desired relief by remaining a covered employee and challenging the plan amendment. The violation he alleged—an amendment of the retirement plan that amounted to a breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109—was not one that in and of itself divested aggrieved parties of their status as covered employees able to sue. McClendon, on the other hand, had no such choice. A discharge to prevent vesting of benefits in violation of section 510 by definition must be challenged by someone other than a current employee or someone with a claim to vested benefits. Thus, the standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing. *See Amalgamated Clothing*, 861 F.2d at 1410.

The Third Circuit alluded to this problem in its recent *Berger* decision. There, Edgewater Steel amended its retirement plan to eliminate two benefits: a lump sum payment in place of the first three months of pension benefits, and a supplemental payment given as an early retirement benefit to employees whose retirement was in the mutual interests of the company and the retiree and was approved by the company. Upon announcement of these changes, Berger and the other plaintiffs chose to retire before the amendments became effective. They each received the three-month lump sum provided automatically to all retirees, but none were approved for the supplemental payment. Among the plaintiffs' allegations were a charge that the elimination of the three-month

lump sum amounted to the elimination of an accrued benefit in violation of ERISA § 204(g), 29 U.S.C. § 1054(g), and a charge that the amendment constituted an intentional interference with their right to both benefits, in violation of ERISA § 510, 29 U.S.C. § 1140. The court, citing *Kuntz* and *Yancy*, held that the plaintiffs did not have standing to assert their section 204(g) claim because they had retired and accepted the benefits in a lump sum, and had not asked for reinstatement. *Berger*, 911 F.2d at 921-22. However, the court noted the contingency of this conclusion on the denial of the plaintiffs' section 510 claim. *Id.* at 922. It stated: "Of course, we recognize that if the Employees were constructively discharged as they do claim, they would not necessarily have to return to work in order to have standing to claim a make whole remedy." *Id.*[5]

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5 A Third Circuit decision in a pre-*Firestone* case provides an even more direct illustration of the contingency of standing on the nature of the ERISA violation alleged. In *Saporito v. Combustion Engineering Inc.*, 843 F.2d 666 (3d Cir.1988); *vacated*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989), the plaintiffs claimed that they had been induced to retire under one retirement plan while the employer concealed the development of a second plan with more favorable terms. The court held that they did not have standing as participants in the first plan to sue for breach of fiduciary duties because they had retired and received all of the benefits to which they were entitled in a lump sum. *Id.* at 671. However, the court did hold that they had standing as participants in the *second* plan to argue that they had been tricked into retiring in violation of section 510, because they alleged that "but for the selective divulgence of information, they would have been members of [the second plan], and, for the purposes of standing to bring an action under ERISA, should be considered as such." *Id.* at 672; *see also id.* at 672 n. 7 (distinguishing *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir.1986), in which the plaintiff urged "but for" participant standing, but his claim was rejected because the events precluding standing were under his control). *Saporito* was vacated and remanded by the Supreme Court for further consideration in light of *Firestone*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989).

On the record before us, we cannot say where on the spectrum between *Yancy* and *McClendon* this case falls. Because appellants pleaded their ERISA claims only as contingent on preemption of their state law claims, and because the district court did not rule on the merits of the ERISA claims, appellants have not fleshed out their ERISA claims and theories, or even identified with precision which sections of ERISA they claim were violated. However, their allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that but for Mobil's nondisclosure they would be covered employees with standing to challenge the plan amendment. They allege deceptive conduct by Mobil that might be found to vitiate the voluntariness of their decision to retire and that might distinguish the present case from both *Yancy* and *Mitchell*. Appellants also sought reinstatement in their ADEA action, and did not affirmatively indicate that reinstatement was not sought under their ERISA claims. For these reasons, we cannot now foreclose the possibility that they could prove facts that would create standing for them, and we believe that the trial court's dismissal on the pleadings of the ERISA claims was premature. Of course, appellants can, and doubtless should, be required to plead their ERISA claims with greater specificity.

We emphasize that we have not determined that appellants will be able to establish a violation of section 510, only that they should be allowed to attempt to do so. We reverse the trial court's dismissal of appellants' ERISA claims and remand for further proceedings consistent with this opinion.

Conclusion

For the reasons stated above, we affirm the district court's grant of summary judgment to Mobil on the ADEA claims and its grant of judgment on the pleadings for Mobil on all of appellants' state law claims. However, we reverse and remand the district court's dismissal of appellants' ERISA claims.

AFFIRMED In Part; REVERSED And REMANDED In Part.

Order of the United States District Court for the Eastern District of Texas granting Motion for Judgment on the Pleadings and Motion to Dismiss, June 22, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civ. No. B-89-0653-CA

June 22, 1990

GERALD W. CHRISTOPHER, *et al.*,
Plaintiffs,

—v.—

MOBIL OIL CORPORATION, *et al.*,
Defendants.

ORDER

1. CAME ON to be considered the Motion for Judgment on the Pleadings and Motion to Dismiss filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' state-law claims are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") because those claims relate to Mobil's Retirement Plan, which is governed by

ERISA, and directly overlap with provisions of ERISA;

B. Plaintiffs are not participants seeking to recover benefits under Mobil's Retirement Plan and therefore have no cause of action under ERISA § 502; and

C. The Court lacks jurisdiction over plaintiffs' ERISA claim because plaintiffs do not have a cause of action under ERISA.

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Judgment on the Pleadings and Motion to Dismiss be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd DAY OF JUNE, 1989 [sic].

/s/ RICHARD A. SCHELL
United States District Judge

Order of the United States District Court for the Eastern District of Texas granting Motion for Summary Judgment, June 22, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civ. No. B-89-0653-CA

June 22, 1990

GERALD W. CHRISTOPHER, *et al.*,
Plaintiffs,

—v.—

MOBIL OIL CORPORATION, *et al.*,
Defendants.

ORDER

1. CAME ON to be considered the Motion for Summary Judgment filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, statement of undisputed facts, declaration and affidavit, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' Age Discrimination in Employment Act ("ADEA") claims are time-barred because (*i*) plaintiffs did not file an age-discrimination charge with the Equal Employment Opportunity Commission within 300 days after the alleged discrimination occurred (29 U.S.C. § 626(d)(2)), and (*ii*) plaintiffs

did not file a lawsuit under ADEA within three years after the alleged discrimination occurred (29 U.S.C. §§ 255(a), 626(e));

B. Plaintiffs' state-law claims are time-barred by applicable statutes of limitations;

C. Plaintiffs were not constructively discharged in violation of ADEA; and

D. Plaintiffs' claims of discrimination arise from changes in the fringe benefits available under Mobil's bona fide Retirement Plan, not from any conduct related to the nonfringe-benefit aspects of plaintiffs' employment, and are therefore not within the scope of ADEA pursuant to 29 U.S.C. § 623(f)(2).

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd DAY OF JUNE, 1989 [sic].

/s/ RICHARD A. SCHELL
United States District Judge

Order of the United States Court of Appeals for the Fifth Circuit denying appellants' petition for rehearing, February 24, 1992

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4562

Filed: Feb. 24, 1992

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY and BILLY G. TURNER,

Plaintiffs-Appellants,

versus

MOBIL OIL CORPORATION, RETIREMENT PLAN OF MOBIL OIL CORPORATION AND REX ADAMS,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING

( )

Before:

HENLEY*, KING, and GARWOOD,
Circuit Judges.

* Circuit Judge of the Eighth Circuit, sitting by designation.

PER CURIAM:

IT IS ORDERED that appellants' petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ WILL GARWOOD
United States Circuit Judge

Order of the United States Court of Appeals for the Fifth Circuit denying appellees' petition for rehearing, February 24, 1992

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4562

Filed: Feb. 24, 1992

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY and BILLY G. TURNER,

Plaintiffs-Appellants,

versus

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Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING

( )

Before:

HENLEY*, KING, and GARWOOD,

Circuit Judges.

* Circuit Judge of the Eighth Circuit, sitting by designation.

PER CURIAM:

IT IS ORDERED that appellants' petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ WILL GARWOOD
United States Circuit Judge

ERISA § 3(7), 29 U.S.C. § 1002(7)

For purposes of this subchapter:

* * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 502, 29 U.S.C. § 1132

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary *(A)* to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or *(B)* to obtain other appropriate equitable relief *(i)* to redress such violations or *(ii)* to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary *(A)* to enjoin any act or practice which violates any provision of this subchapter, or *(B)* to obtain other appropriate equitable relief *(i)* to redress such violation or *(ii)* to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or *(i)* or *(l)* of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator *(A)* who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or *(B)* who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to fur-

nish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the

employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may

be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

***(l)* Civil penalties on violations by fiduciaries**

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

ERISA § 510, 29 U.S.C. § 1140

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Listing of Mobil Oil Corporation Subsidiaries

Listing Pursuant to Sup. Ct. R. 29.1 of Mobil Oil Corporation's Parent and Non-Wholly-Owned Subsidiaries of Which Mobil Oil Corporation Owns at Least 5% (as of February 18, 1992)

MOBIL CORPORATION (PARENT)

ABRORAY PTY. LIMITED
ABU DHABI PETROLEUM COMPANY LIMITED
ACE POLYMER CO., LTD.
ADRIA WIEN PIPELINE GESMBH
AIMCO (ALPHA) SHIPPING COMPANY
AIMCO (OMEGA) SHIPPING COMPANY LTD.
AIRCRAFT FUEL SUPPLY B.V.
AIRTANKDIENST KOELN
AK CHEMIE GMBH & CO. KG
AKAUMA ASPHALT INDUSTRIES, LTD.
ALEXANDROUPOLIS PETROLEUM INSTALLATION S.A.
ALTONA PETROCHEMICAL COMPANY LIMITED
AMMENN GMBH
ANDREWS OIL PTY. LIMITED
ANKARA GAZ SATIS A.S.
ARABIAN CHEMICAL TERMINALS
ARABIAN INTERNATIONAL MARITIME COMPANY
ARABIAN INTERNATIONAL MARITIME COMPANY LIMITED
ARABIAN TRADING CO. S.A.
ARAL AKTIENGESELLSCHAFT
ATAS ANADOLU TASFIYEHANESI A.S.
ATLAS SAHARA S.A.
AUSTRALIAN SYNTHETIC RUBBER CO LIMITED

AUTOBAHN-BETRIEBE GESELLSCHAFT MBH
AVIATION FUEL SERVICES LIMITED
AYGAZ A.S.
BALGEE OIL PTY. LIMITED
BANGKOK AVIATION FUEL SERVICES LIMITED
BARRORAFT PTY. LTD
BAYERISCHE ERDGASLEITUNG GMBH
BAYERISCHE MINERAL-INDUSTRIE A.G.
BEER GMBH
BEER GMBH & CO. MINERALOEL-VERTRIEBS-KG
BIN SULAIMAN MOBIL TOWERS
BRICKWOOD HOLDINGS PTY. LTD
BUCK MINERALOELHANDEL KG
CANADIAN SUPERIOR OIL (AUST.) PTY. LTD.
CANNER'S STEAM COMPANY, INC.
CANYON REEF CARRIERS, INC.
CAS (COMBINED AUTOMATION SYSTEM) B.V.
CELMISIA SHIPPING CORPORATION
CENTRAL AFRICAN PETROLEUM REFINERIES (PRIVATE) LIMITED
CERCERA S.A.
CHANGI AIRPORT FUEL HYDRANT INSTALLATION PTE. LTD.
CHUBU TORESEN K.K.
COLLINS PIPELINE COMPANY
COLOMBIANOS DISTRIBUIDORES DE COMBUSTIBLES, S.A. "CODI"
COLONIAL PIPELINE COMPANY
COMET BRENNSTOFFDIENST GMBH
COMMERCIAL POLYMERS PTY. LIMITED
COMMODORE MARITIME COMPANY S.A.
COMPAGNIE AFRICAINE DE TRANSPORT CAMEROUN (CAT.CN)
COMPAGNIE D'ENTREPOSAGE COMMUNAUTAIRE
COMPAGNIE DES PETROLES PRIMAGAZ

COMPAGNIE SENEGALAISE DES LUBRIFIANTS
COMPANIA DE LUBRICANTES DE CHILE
LIMITADA (COPEC MOBIL LTDA.)
CONSORTIUM RAYMOND DUEZ
COOK INLET PIPE LINE COMPANY
COREDIS
CORYTON COGEN LIMITED
CYPRUS PETROLEUM REFINERY LIMITED
DEPOT PETROLIER DE MOUREPIANE
DEPOT PETROLIER DU GRESIVAUDAN
DEPOTS DE PETROLE COTIERS
DEPOTS PETROLIERS DE LA CORSE (DPLC)
DEUTSCHE PENTOSIN-WERKE GMBH
DEUTSCHE TRANSALPINE OELLEITUNG GMBH
DIXIE PIPELINE COMPANY
DUKHAN SERVICES COMPANY W.L.L.
DUPONT & DEWULF N.V.
EAST TEXAS SALT WATER DISPOSAL COMPANY
ENTREPOT PETROLIER DE MULHOUSE
ENTREPOT PETROLIER DE NANCY
ENTREPRISE JEAN LEFEBVRE
ERDGAS-VERKAUFS-GESELLSCHAFT MBH
ERDOEL-RAFFINERIE NEUSTADT GMBH
& CO. OHG
ERDOL-LAGERGESELLSCHAFT MBH
ESTACIONES DE SERVICIO ML, S.A.
ETABLISSEMENTS BOUTHENET
ETABLISSEMENTS JOSEPH WALLACH
ETABLISSEMENTS ROHRMANN DUFOSSE
FAIRWIND MARITIME COMPANY S.A.
FAVANG AUTOVERKSTED A/S
FELIX OIL COMPANY
FIBIL S.A.
FILTROS DE COSTA RICA, S.A.
FRUEHMESSER GMBH

FRUEHMESSER MINERALOLHANDELS GMBH & CO. KG
FUSO OPERATIONS KABUSHIKI KAISHA
GATWICK REFUELLING SERVICES LIMITED
GAZAL-GAZ ALETLERI A.S.
GEOMINES-CAEN
GEOVEXIN
GHANA BUNKERING SERVICES LIMITED
HANIEL HANDEL GMBH
HEIZOL-HANDELSGESELLSCHAFT MBH
HELLAS GAS STORAGE CO. S.A.
HIBERNIA MANAGEMENT AND DEVELOPMENT COMPANY LIMITED
HYDRANTEN-BETRIEBS-GESELLSCHAFT FLUGHAFEN/FRANKFURT
INDUSTRIA INTERAMERICANA DE FILTROS LTDA. "INTERFIL"
INTOPLANE SERVICES COMPANY LIMITED
IRANIAN OIL PARTICIPANTS LTD.
IRANIAN OIL SERVICES (HOLDINGS) LTD.
IRANIAN OIL SERVICES LIMITED
IRAQ PETROLEUM COMPANY LIMITED
IRAQ PETROLEUM PENSIONS LIMITED
ITALOIL S.R.L.
JAPAN AIRPORT FUELING SERVICE COMPANY, LTD.
JECOP
K.K. SANKYO PLASTICS
K.K. TORESEN
KANSAI PETRO-TERMINAL CO., LTD.
KANTO KYGNUS SEKIYU HAMBAI K.K.
KARL STORZ GMBH & CO. KG
KAWASAKI KYGNUS SEKIYU HAMBAI K.K.
KEIYO SEA-BERTH COMPANY, LTD.
KLAUS KOEHN GMBH
KLAUS KOEHN GMBH & CO. MINERALOEL KG

KURT AMMENN GMBH & CO. KG
KYGNUS EKKA GAS KABUSHIKI KAISHA
KYGNUS KOSAN KABUSHIKI KAISHA
KYGNUS MARKETING SERVICE K.K.
KYGNUS SEKIYU KABUSHIKI KAISHA
KYGNUS SEKIYU SEISEI KABUSHIKI KAISHA
KYOKUTO SEKIYU KOGYO KABUSHIKI KAISHA
LA CENTRAFRICAINE DES PETROLES
LILAC SEKIYU K.K.
LIPET-LIKIT PETROL GAZI VE YAKIT TICARET A.S.
LUBLEND LIMITED
LUBRICANTES DEL SUR, S.A.
MARCEAUX & CIE
MATCO TANKERS (U.K.) LIMITED
MEENTZEN & FRANKE GMBH & CO.
MERTL GMBH
MID STATE PETROLEUM PTY. LIMITED
MINERALOEL-HANDELS-GESELLSCHAFT MBH
MINERALOELWERK WEDEL GMBH & CO. OHG
MOBIL CATALYSTS CORPORATION OF JAPAN
MOBIL KOREA LUBE OIL, INC.
MOBIL MARKETING BARBADOS COMPANY LIMITED
MOBIL MOTOR REST S.A.
MOBIL OIL—AFOR KERESKEDELMI KFT.
MOBIL OIL BARBADOS LIMITED
MOBIL OIL DE MEXICO, S.A. DE C.V.
MOBIL OIL DJIBOUTI
MOBIL OIL FRANCAISE
MOBIL OIL GABON
MOBIL OIL GHANA LIMITED
MOBIL OIL MAROC
MOBIL OIL NIGERIA PUBLIC LIMITED COMPANY
MOBIL OIL PORTUGUESA S.A.

MOBIL PRODUCING CAMEROON INC.
MOBILGAZ MOBIL PETROL GAZLARI A.S.
MOGESTE-GESTAO DE POSTOS DE ABASTECIMENTO LDA.
MOTEL REST S.A.
MT. MARROW BLUE METAL QUARRIES PTY. LIMITED
MULTI TANK CARD B.V.
N.V. ROTTERDAM-RIJN PIJPLEIDING MAATSCHAPPIJ
N.V. SOCONY-STANDARD-VACUUM OIL COMPANY (PETROLEUM MAATSCHAPPIJ)
NAKAJIMA KOSAN KABUSHIKI KAISHA
NEAR EAST DEVELOPMENT CORPORATION
NEW ZEALAND SYNTHETIC FUELS (HOUSING) CORPORATION LIMITED
NEW ZEALAND SYNTHETIC FUELS CORPORATION LIMITED
NICHIMO OIL (BERMUDA) CO., LTD.
NIPPON UNICAR COMPANY, LIMITED
NORDDEUTSCHE ERDGAS-AUFBEREITUNGS-GESELLSCHAFT MBH
NORVAC PTY. LIMITED
OCTAGON PTY. LTD
OLDENBURGISCHE ERDOEL GESELLSCHAFT MBH
OLJEFORSYNING OFAS A.S.
OSAKA KYGNUS K.K.
OVENS & MURRAY PETROLEUM PTY. LTD.
P.T. ARUN NATURAL GAS LIQUEFACTION COMPANY
P.T. STANVAC INDONESIA
PALOMA PIPE LINE COMPANY
PARS INVESTMENT CORPORATION (PRIVATE COMPANY)

PAUL HARLING MINERALOEL GMBH & CO. KG
PEACE PIPE LINE LTD.
PERKAL PTY. LIMITED
PETROCAB
PETROCAM PTY. LIMITED
PETROGAS PROCESSING LTD.
PETROLEUM SERVICES (MIDDLE EAST) LIMITED
PETROMIN LUBRICATING OIL COMPANY
PETROMIN LUBRICATING OIL REFINING COMPANY
PETROMIN-MOBIL YANBU REFINERY COMPANY LTD.
PIONEER KOSAN K.K.
PLEGADIZOS PARA LA INDUSTRIA S.A.
PRESNALL PTY. LIMITED
PROGAS LIMITED
PROVIDANGE
P6-GROEP B.V.
R. SHERWOOD LIMITED
RACOON S.R.L.
RAINBOW PIPE LINE COMPANY LTD.
RED SEA PLASTIC FACTORY COMPANY LIMITED
REGULUS HOLDING (SINGAPORE) PTE. LTD.
RHODES PETROLEUM INSTALLATION S.A.
ROHOL-AUFSUCHUNGS GESELLSCHAFT MBH
RUHRGAS AKTIENGESELLSCHAFT
RUNDEL MINERALOELVERTRIEB GMBH
S.C. BRUSSELS AIRFUELS SERVICES C.V.
SABA-SOCIEDADE ABASTECEDORA DE AERONAVES LDA.
SARL ETABLISSEMENTS MICHEL FAURE
SAUDI MARITIME COMPANY LTD.
SAUDI YANBU PETROCHEMICAL CO.
SAWYER PETROLEUM PTY. LTD.
SCHUBERT KOMMANDITGESELLSCHAFT

SEGHER DE MEXICO, S.A. DE C.V.
SIERRA LEONE PETROLEUM REFINING COMPANY LIMITED
SIGEL INCORPORATED
SOCIETÀ ITALIANA PER L'OLEODOTTO TRANSALPINO—SIOT S.P.A.
SOCIETE "LES FILS DE FERRERO"
SOCIETE AFRICAINE DE RAFFINAGE (S.A.R.)
SOCIETE ANONYME DE GESTION DES STOCKS DE SECURITE
SOCIETE BELGE DE TRANSPORT PAR PIPELINE S.A.
SOCIETE CAMEROUNAISE DE DEPOTS PETROLIERS (S.C.D.P.)
SOCIETE COLMARIENNE DE DISTRIBUTION DE PRODUITS PETROLIERS
SOCIETE COMBUSTIBLES DE PROVENCE
SOCIETE D'ENTREPOSAGE DE GABES
SOCIETE D'ENTREPOSAGE DE SAN PEDRO
SOCIETE D'ENTREPOSAGE PETROLIER AU BURUNDI (SEP BURUNDI)
SOCIETE DE CONSTRUCTION & DE GESTION CB.12
SOCIETE DE GESTION DE DEPOTS D'HYDROCARBURES
SOCIETE DE GESTION DES STOCKS PETROLIERS DE COTE D'IVOIRE (GESTOCI)
SOCIETE DE MANUTENTION CARBURANTS AVIATION DE TAHITI (SOMCAT)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION (S.M.C.A.)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION DAKAR-OFF
SOCIETE GABONAISE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE GABONAISE DE RAFFINAGE

SOCIETE IVOIRIENNE DE FABRICATION DE LUBRIFIANTS (S.I.F.A.L.)
SOCIETE IVOIRIENNE DE RAFFINAGE
SOCIETE MALIENNE D'ENTREPOSAGE (S.M.E.)
SOCIETE MAURITANIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE NATIONALE DE RAFFINAGE
SOCIETE PIZO DE FORMULATION DE LUBRIFIANTS
SOCIETE STATION-SERVICE LUNES
SOCIETE TAHITIENNE DE DEPOTS PETROLIERS
SOCIETE TAHITIENNE DES OLEODUCS (STDO)
SOCIETE TCHADIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE TOGOLAISE D'ENTREPOSAGE
SOCIETE WALLISIENNE ET FUTUNIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE ZAIROISE D'EMBALLAGE
SOUTH SASKATCHEWAN PIPE LINE COMPANY
STATFJORD TRANSPORT A.S.
STE CAMEROUNAISE EQUATORIALE DE FABRICATION DE LUBRIFIANTS (S.C.E.F.L.)
STE DES BITUMES & CUT-BACKS DU CAMEROUN (S.B.C.B.C.)
STRASBURGER ENTERPRISES (PROPERTIES) PTY. LIMITED
SUN EAST COMPANY LIMITED
SUPERIOR DISK CORPORATION
SYDNEY METROPOLITAN PIPELINE PTY. LIMITED
T&M TERMINAL COMPANY
TANKBAU-GMBH
TANKLAGERGESELLSCHAFT KOELN-BONN
TAR TANKANLAGE RUEMLANG A.G.
TECKLENBURG GMBH

TECKLENBURG GMBH & CO. ENERGIEBEDARF KG
TEMA LUBE OIL COMPANY LIMITED
TGF TANKDIENST-GESELLSCHAFT FRANKFURT
THAILAND SOLVENT PRODUCTS LIMITED
THE ARABIAN ENERGY COMPANY LIMITED
THE ARABIAN PETROLEUM SUPPLY CO. (S.A.)
THE NEW ZEALAND REFINING COMPANY LIMITED
THE SAUDI CAN COMPANY LTD.
TOHPREN CO. LTD.
TOKUSHIMA SEKIYU KABUSHIKI KAISHA
TONEN CHEMICAL CORPORATION
TONEN CORPORATION
TONEN ENERGY AND MARINE (SINGAPORE) PTE. LTD.
TONEN ENERGY INTERNATIONAL CORPORATION
TONEN FILARE CO., LTD.
TONEN FILM CO., LTD.
TONEN PROPERTIES INC.
TONEN SOGO SERVICE CO. LTD.
TONEN SYSTEM PLAZA INC.
TONEN SYSTEM SERVICE INC.
TONEN TANKER KABUSHIKI KAISHA
TONEN TAPYRUS COMPANY LIMITED
TONEN TECHNOLOGY KABUSHIKI KAISHA
TONEX COMPANY LIMITED
TOWA COMPOUNDING COMPANY LIMITED
TOYOSHINA FILM COMPANY LIMITED
TRADEWIND MARITIME CO. S.A.
TRANSALPINE OELLEITUNG IN OESTERREICH GESELLSCHAFT MBH
TRESKOME PTY. LIMITED
TRYICE PTY. LIMITED
TULLIA 89 S.R.L.

TURKISH PETROLEUM COMPANY LIMITED
TWIFO OIL PALM PLANTATIONS LIMITED
UBAG UNTERFLUR-BETANKUNGSANLAGE A.G.
UNITED KINGDOM OIL PIPELINES LIMITED
W.A.G. PIPELINE PTY. LIMITED
WAITOMO/BRENAN PETROLEUM LIMITED
W/BP
WAKO JUSHI KABUSHIKI KAISHA
WALTON-GATWICK PIPELINE COMPANY LIMITED
WERNER WEIDEMANN MINERALOELVERTRIEB GMBH
WEST LONDON PIPELINE AND STORAGE LIMITED
WEST SHORE PIPE LINE COMPANY
WILHELM MERTL GMBH & CO. KG
WIRI OIL SERVICES LIMITED
WOLVERINE PIPE LINE COMPANY
WYMONDHAM OIL STORAGE CO. LIMITED
ZAIRE MOBIL OIL S.A.R.L.
ZAIRE S.E.P.